

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

838

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,921

UNITED STATES OF AMERICA

v.

EDWARD D. WHEELER
Appellant

BRIEF FOR APPELLANT

Appeal from an Order of the United States
District Court for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED JUL 6 1970

Nathan J. Paulson
CLERK

THOMAS E. BEALL, JR.
1000 Crystal Plaza One
2001 Jefferson Davis Highway
Arlington, Virginia 22202

Of Counsel:

William T. Bullinger
730 15th Street, Northwest
Washington, D.C. 20005

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II. STATEMENT OF QUESTIONS PRESENTED

1. Whether appellant's guilty plea was entered knowingly and voluntarily in view of the inadequate advices of the Court and appellant's attorney concerning the nature of the crime of assault with a dangerous weapon and the consequences of a plea of guilty.
2. Whether appellant was sufficiently apprised of the relationship between the law and the facts as to enable him to plead.

IIa. REFERENCES TO RULINGS

The Criminal Action No. 1256-68 in the United States District Court for the District of Columbia wherein a hearing was held before Judge Hart on January 8, 1969 and sentence imposed February 28, 1969 forms the basis of this appeal.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,921

UNITED STATES OF AMERICA

v.

EDWARD D. WHEELER,
Appellant

Appeal from an Order of the United States
District Court for the District of Columbia

BRIEF FOR APPELLANT

III. STATEMENT OF PREVIOUS APPEAL PROCEEDINGS

This criminal case has not been before the District of Columbia
Circuit Court of Appeals prior to this appeal.

IV. STATEMENT OF JURISDICTION

Appellant appeals from an Order of the United States District Court
for the District of Columbia denying his motion under 28 U.S.C. §2255 to
withdraw guilty plea or vacate sentence.

The jurisdiction of this Court for this appeal is expressly provided
for in 28 U.S.C. §2255.

V. STATEMENT OF FACTS

Appellant, Edward D. Wheeler, with the advice of retained counsel, withdrew his plea of not guilty and plead to guilty to the charge of assault with a dangerous weapon (22 D.C. Code §502) at a hearing before Judge Hart of the United States District Court for the District of Columbia, on January 8, 1969. A sentence to a term of imprisonment of from two (2) to six (6) years was imposed on February 28, 1969. Appellant's motion under 28 U.S.C. §2255 to withdraw his plea of guilty was denied by the United States District Court for the District of Columbia on December 23, 1969. Leave was granted appellant to appeal in forma pauperis on January 5, 1970, pursuant to 28 U.S.C. §1915. The relevant background facts which culminated in appellant's plea of guilty are as follows.

Appellant Edward D. Wheeler was born on February 5, 1935, in Washington, D.C. He has been a life-long resident of the District of Columbia, with the exception of eighteen (18) months voluntary service in the Navy spent primarily in Korea. Appellant has no previous criminal record.*

Appellant ended his term with the Navy in 1954, and began working at the Pentagon for the General Services Administration, where he remained for eight (8) years. Since 1963, he has owned his own cab, with a license for the District of Columbia. At the time of the alleged crime, appellant had two (2) jobs. He was driving his cab for Proc Butler's American Service, and was working for W. W. Chambers Co., Inc., Funeral Directors. During

* During oral interview, appellant said that he had been fined \$10.00 in 1956 for depositing trash, and fined in 1957 on a disorderly charge.

oral interview, appellant stated that he bought and registered a gun after the riots in Washington, D.C. in 1967, for self-protection when driving his cab. He was concerned about possible trouble, particularly when driving at night.

The above weapon is the subject of the crime for which appellant is now in prison. The assault occurred during a foolish quarrel between appellant and a friend. Immediately after the assault, appellant proceeded to the tenth precinct and voluntarily informed the police of the incident.

Appellant was charged with the crimes of assault with a dangerous weapon and carrying a deadly weapon, and was admitted to bail. Upon the advice of his bondsman, appellant selected Mr. Leroy Nesbitt as his counsel.

As the Court will note from appellant's pro se memorandum, filed pursuant to Order of February 26, 1970, it is appellant's contention that inadequate procedures were employed by his attorney. This memorandum depicts the relationship between appellant and his attorney by means of recital of their various discussions. The points made by appellant are outlined below.

Appellant first indicates that this attorney, Mr. Nesbitt, asked him to change his plea of not guilty to guilty, and appellant said no. Then, Mr. Nesbitt said he would talk with Mr. Harris, the District Attorney in an effort to get his case transferred to the Court of General Sessions. Mr. Nesbitt assured appellant that if this could be effected appellant would merely be fined. Mr. Nesbitt inquired of appellant if he would have any difficulty getting \$500.00 as a retainer fee. (The exact amount of this fee, \$500.00, was disclosed by appellant during oral interview.) Appellant said no, as he had two (2) jobs at the time. Shortly thereafter, Mr. Nesbitt reported that he had contacted the District Attorney who had said there was nothing he

could do with regard to transferring the case. Mr. Nesbitt once again asked appellant to change his plea, stating that there were no witnesses for his defense. Appellant was then told by his attorney that if he plead guilty to the charge of assault with a dangerous weapon, the Government would drop the second charge of carrying a deadly weapon. He was further advised by his attorney that since it was a first offense, he would get probation. Appellant agreed, and his hearing was scheduled to go before Judge Curran. Mr. Nesbitt told appellant that he couldn't work with Judge Curran, and needed \$50.00 to have the hearing rescheduled. Appellant gave his attorney the requested sum, and was called to appear in court before Judge Hart. Mr. Nesbitt told appellant that Judge Hart was a good Judge, not prejudiced, and would look on the case as "two negroes having a week-end brawl." As a result of this advice from his attorney, appellant changed his plea from not guilty, to guilty.

Upon oral interview, appellant reiterated the statement set forth in his pro se memorandum as above, and further indicated that subsequent to his sentencing, his attorney told him he could get him out on work release within two (2) weeks. During this interview, appellant contended that his attorney never discussed with him the possibility of having a jury trial, much less the advantages and/or disadvantages of same; appellant asserted, however, that Mr. Nesbitt urged him to plead guilty because it would save the Government money, making the implication that this would be very much to his advantage.

Appellant, with counsel, appeared before Judge Hart and his plea was changed from not guilty, to guilty. The very crux of this appeal is that

appellant was denied constitutional rights at his hearing, in that he was not adequately informed of the nature of the crime and the consequences of his plea. Further, counsel did not adequately represent his rights. This denial of appellant's rights is best appreciated by first considering what the law requires in the nature of a hearing wherein a plea of guilty is accepted by the Court. With these requirements of the law in mind, the Court may then readily examine the record of the hearing which was afforded appellant. Appellant submits that this hearing did not comply with the requirements of the law.

VI. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article V:

No person shall be ... deprived of life, liberty or property, without the due process of law...

28 United States Code §2255

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Rule 11 of Federal Rules of Criminal Procedure:

The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of nolo contendere without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea.... The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

22 District of Columbia Code §502:

Every person convicted of an assault with an intent to commit mayhem or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years.

VII. STATEMENT OF POINTS

1. The failure of the district court to conduct a thorough inquiry as to appellant's comprehension of the nature of the charge, the statutory offenses included therein, the range of possible punishments, and possible defenses thereto, at the time the plea was entered, denied the defendant the protection which he was entitled to receive from a federal judge, and amounts to an abuse of discretion on the part of the federal judge.
2. Defendant's inability to apply the law to the facts of his situation, the fact that his attorney did not adequately inform him as to the requirements of the law, and the trial court's failure to ascertain these circumstances, constitutes prejudicial error.

VIII. SUMMARY OF ARGUMENT

The law requires the District judge at a hearing wherein an accused presents a plea of guilty to personally address the accused so as to satisfy himself that the plea is in fact voluntarily and understandingly made, and ordinarily this entails a certain inquiry into the defendant's motivation, as well as determining if the accused is aware of the nature of the charges, the statutory offenses included within them and the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of

the whole matter. The mere presence of counsel for the accused does not lessen the judge's duty, but extends the duty to investigate whether counsel has given the accused proper advice.

Since a plea of guilty is more than an admission of conduct — it is in itself a conviction, it must be made with an understanding of the law in relation to the facts or the accused will be denied his constitutional rights, including his privilege against compulsory self-incrimination guaranteed by the Fifth Amendment, his right to trial by jury and his right to confront his accusers.

At the hearing wherein the guilty plea was accepted, the accused only responded "Yes, sir." to the judge's questions, which were phrased according to the statutory language. From the accused responses at the hearing, one cannot be assured that the accused fully understood the relationship of the law to the facts in the present case.

IX. ARGUMENT

THE COURT BELOW AND APPELLANT'S COUNSEL FAILED TO ADEQUATELY ADVISE APPELLANT OF THE NATURE OF THE CRIME OF ASSAULT WITH A DANGEROUS WEAPON, THE RELATIONSHIP OF THIS CRIME TO THE FACTS OF RECORD, AND THE CONSEQUENCES OF MAKING A PLEA OF GUILTY THERETO

- A. THE LAW REQUIRES THAT APPELLANT BE FULLY INFORMED OF THE CRIME CHARGED AND OF THE SIGNIFICANCE AND CONSEQUENCES OF A PLEA OF GUILTY AT A HEARING WHEREIN SUCH A PLEA IS ACCEPTED, AND A HEARING WHEREIN THE COURT MERELY RECITES THE STATUTORY TERMS OF RULE 11 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE IS INSUFFICIENT AS A MATTER OF LAW.

The law demands that the accused be informed of the nature of the charge, the defenses thereto, and the consequences of the plea. As stated in United States v. Lester, 247 F.2d 496, 500 (2nd Cir. 1957):

The court must determine whether the plea has been improperly induced by the prosecutor and whether the defendant is aware of 'the nature of the charges, the statutory offenses included within them, and the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.' [Citations omitted.]

Further, a specific delineation of the duties of a district judge before accepting a plea of guilty is found in United States v. Howard, 407 F.2d 1102, 1104 (4th Cir. 1969):

Rule 11 requires a district judge to address the defendant personally and determine that 'the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea.' Plainly, this language places an exacting duty on the district judge ... Before accepting the plea the judge must satisfy himself that it is in fact voluntarily and understandingly made, and ordinarily this entails a searching inquiry into the defendant's motivation in entering the plea. [Citations omitted.]

This exacting duty placed upon the district judge is not lessened by presence of counsel. See Durant v. United States, 410 F.2d 689, 692 (1st Cir. 1969), wherein it is stated:

The government in its brief seeks to make much of the fact that this defendant was represented by competent counsel when he changed his plea. The presence of counsel, however, does not relieve the court of its responsibility of inquiry under F.R. Crim. P. 11.

It is clear from the above case law that an essential ingredient of a guilty plea is that it is entered voluntarily, after proper advice, and with full understanding of the consequences.

A defendant who enters a plea of guilty simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination guaranteed by the Fifth Amendment, his right to trial by jury and his right to confront his accusers. A plea of guilty is more than an admission of conduct - it is in itself a conviction. Consequently, if a defendant's guilty plea is not adequately knowing and voluntary, it has been obtained in violation of due process and is therefore void. And since such a plea is an admission which essentially encompasses all the elements of being convicted on a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts. For this reason, the court must necessarily be thorough in its investigation of all the circumstances surrounding a guilty plea, see United States v. Howard, supra, at 1105, wherein the court states:

Insistence upon thorough inquiry as to voluntariness before acceptance of a guilty plea is not an empty ritual; it goes to the heart of the proceeding and the Rule demands genuine and not perfunctory observance.

As this Court will presently see, appellant's hearing did not comport with the above requirements of the law with regard to a court's acceptance of a plea of guilty, and the Court will now better appreciate the perfunctory nature of the hearing afforded appellant, all being in violation of Rule 11.

A. THE HEARING AFFORDED APPELLANT DID NOT COMPORT WITH THE LAW IN THAT THE COURT MERELY RECITED THE WORKS OF THE STATUTE AND IN NO WAY COMMUNICATED TO APPELLANT THE CONSEQUENCES OF HIS PLEA.

As stated previously, Rule 11 requires that a district judge satisfy himself that a guilty plea is knowingly and voluntarily made. This would naturally involve a comprehensive examination of the defendant's motivation

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A. THE HEARING AFFORDED APPELLANT DID NOT COMPORT WITH THE LAW IN THAT THE COURT MERELY RECITED THE WORKS OF THE STATUTE AND IN NO WAY COMMUNICATED TO APPELLANT THE CONSEQUENCES OF HIS PLEA.

As stated previously, Rule 11 requires that a district judge satisfy himself that a guilty plea is knowingly and voluntarily made. This would naturally involve a comprehensive examination of the defendant's motivation

in entering the plea. Appellant contends that the very routine, brief questioning undertaken by the court was clearly insufficient to satisfy the required standard. The record shows the following interchange between appellant and the district judge just before the plea was accepted:

THE COURT: Do you understand the nature of the charge against you, which is that you assaulted one Edward D. Wheeler with a dangerous weapon, that is, a pistol? Do you understand the nature of the charge, which is a charge of assault with a dangerous weapon?

MR. NESBITT: Your Honor, before he answers, the assault was committed by Mr. Wheeler on ---

THE COURT: I'm sorry, against William Wade. Do you understand the nature of the charge?

THE DEFENDANT: Yes, sir.

.....

THE COURT: Do you understand that as a result of your plea of guilty you may be sentenced to a prison term of as much as ten years by this Court? Do you understand that?

THE DEFENDANT: Yes, sir.

.....

THE COURT: Have you discussed the entry of this plea fully with your attorney?

THE DEFENDANT: Yes, sir.

THE COURT: Are you completely satisfied with the services of your attorney in this case?

THE DEFENDANT: Yes, sir.

THE COURT: The Court will accept the plea.

A judge cannot properly assume that a defendant is entering the guilty plea with a complete understanding of the charge against him merely because

the defendant, in response to the judge's remarks, states his desire to plead guilty and expresses that he understands the consequences of such plea as explained by the judge. In the instant case, the record indicates no exchange between defendant's counsel and the court as to what counsel had discussed with appellant. Further, appellant made no fuller response to the court's routine statements than "Yes, sir." This is hardly indicative of a real grasp of the situation by defendant, but rather a result of defendant relying trustingly on the advice of his counsel, the only recourse available to one inexperienced in the workings of the law. It is contended that defendant plead guilty without a true comprehension that he was relinquishing rights due him by the constitution. For this waiver of rights to be valid under the Due Process Clause, it must be "an intentional relinquishment or abandonment of a known right or privilege," Johnson v. Zerbest, 304 U.S. 458, 464 (1938). [Emphasis added.]

The law is clear in stating that more is required of the court than a mere routine inquiry, i.e., the asking of several standard questions of a person making a plea of guilty. The recitation of the language of the statute would not satisfy the requisites of the law, as such does not take into account the realities facing the defendant. More particularly, the myriad of defenses available to the defendant are absent from such statutory language, and the record above attests to the fact that no mention of such defenses was ever made. The court stated in United States v. Howard, *supra*, at 1105:

Merely soliciting an affirmative answer to a question couched in conclusory terms, without more, is not enough.

And further, in United States v. Lester, *supra*, at 500:

[I]t has been held that the mere statement of the accused that he understands the charge against him

does not relieve the court of the responsibility of further inquiry. . . . Comprehension of the charge demands more than familiarity with the crime alleged.

Appellant submits that when the true situation of appellant's plight at his hearing is recognized, and, further, when this situation is measured against the above requirements of the law, it is clear that an injustice has occurred which should be eliminated by granting the relief prayed for under 28 U.S.C. 2255.

X. CONCLUSION

Appellant's guilty plea was not entered knowingly and not entered voluntarily in view of the inadequate advices of the court and appellant's attorney concerning the nature of the crime of assault with a dangerous weapon and the consequences of a guilty plea. Further, appellant was not sufficiently apprised of the relationship between the law and the facts as to enable him to plead.

Appellant's employment resulting in the purchase and registering of the gun in questions, the nature of the argument resulting in the assault and appellant's behavior after the assault are all circumstances not inquired into by the court and which would have a mitigating effect. The court did not inquire into the various promises and representations made by appellant's attorney and the failure of appellant's attorney to advise appellant of his constitutional rights with respect to a jury trial and the consequences thereof were not inquired into by the court in an effort to determine if appellant was satisfactorily represented by counsel.

The court did not conduct a thorough inquiry as to appellant's comprehension of the nature of the charge, its consequences, and the facts

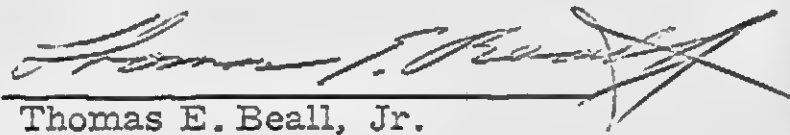
relating thereto. This failure was prejudicial in that appellant's attorney also did not inform appellant of the proceedings that were available to him for his defense. The mere affirmative answers by appellant at the hearing to the district judge's questions that were couched in conclusory terms was not enough to satisfy the law with respect to the inquiry that must be made by the district judge at a hearing wherein a guilty plea is accepted. The relief prayed for under 28 U.S.C. 2255 should be granted and is respectfully requested.



Thomas E. Beall, Jr.
(Appointed by the Court of Appeals)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Appellant was mailed to the United States Attorney, United States Court House, Washington, D.C. 20001, by prepaid first class, this 6th day of July, 1970.



Thomas E. Beall, Jr.



CERTIFICATE OF SERVICE

I hereby certify that a copy of the Brief for Appellant was mailed to the United States Attorney, by prepaid first class on July 6, 1970, and further that the foregoing pages including new title page and retyped pages 2, 3 and 4 to be substituted for the original pages appearing in said Brief for Appellant were mailed to the United States Attorney, United States Court House, Washington, D. C. 20001, by prepaid first class, this 7th day of July, 1970.



Thomas E. Beall, Jr.
(Appointed by the Court of Appeals)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,921
(CR. No. 1256-68)

UNITED STATES OF AMERICA

Appellee,

v.

EDWARD D. WHEELER

Appellant.

United States Court of Appeals
for the District of Columbia Circuit

REPLY BRIEF

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ARGUMENT

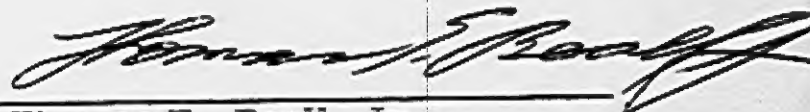
We note that appellee agrees with the citation of our cases, and that "they merely state what the Supreme Court also expounded in extenso in McCarthy v. United States, 394 U.S. 459 (1969)"; page 1 of appellee's Brief. Appellant is aware of the date limitation of the McCarthy case and accordingly no reliance has been made on this case in appellant's Brief.

Appellee's several pages discussing Rule 32(d), Fed. R. Crim. P., is interesting but of no concern in this appeal, because appellant makes no assertions under this Rule. Appellant's reliance is based upon Rule 11, Fed. R. Crim. P.

The interrogation of appellant made by the Court as set forth in the Briefs, was merely in statutory language. There is no interrogation made by the Court to determine the factual basis of the plea, as required by Rule 11, Fed. R. Crim. P. Appellee has criticized appellant for placing factual information in his Brief that is not in the record; appellee is entirely correct that this factual information is not in

the record and this is precisely what appellant's contention is. That is, the record does not contain any facts with respect to the case sufficient for the Court to satisfy itself that there was a factual basis for the plea.

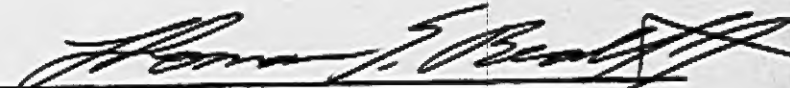
WHEREFORE, appellant respectfully requests granting of the relief requested.



Thomas E. Beall, Jr.
(Appointed by the Court of Appeals)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief has been mailed to Thomas A. Flannery, United States Attorney and John A. Terry, Assistant United States Attorney, United States Court House, Washington, D.C. 20001, by prepaid first class, this 18th day of September, 1970.



Thomas E. Beall, Jr.
1000 Crystal Plaza One
2001 Jefferson Davis Highway
Arlington, Virginia 22202